

ANNEXURE B

TERMS OF REFERENCE

Proceedings means proceedings number 2014/223271.

First Primary Judgment means reasons and orders made in *Moore v Scenic Tours (No.2)* [2017] NSWSC 733.

Second Primary Judgment means reasons and orders made in *Moore v Scenic Tours (No. 4)* [2022] NSWSC 270.

Group Member means a passenger on board Cruises 1 to 9 and 11 as set out in paragraph 13 of the First Primary Judgment excluding the plaintiff and any Group Member who has opted out of the Proceedings or whose claim for damages pursuant to s 267(4) of the *Australian Consumer Law* was determined in the Second Primary Judgment.

- (1) These terms of reference are subject to any more specific orders made by the Court in relation to the conduct of the Reference.
- (2) The parties are to provide such assistance to the Referees as is reasonably necessary to assist the Referees in the conduct of the Reference in accordance with these terms of reference.
- (3) The Referees are to consider and implement such manner of conducting the Reference as will, without undue formality or delay, enable a just, quick and cheap resolution of the Reference and completion of the Referees' report.
- (4) In order to facilitate the implementation of the just, quick and cheap resolution of the Reference and completion of the Referees' report, the Referees are to each make such directions as they consider appropriate as to the conduct of the Reference.
- (5) The Referees may, to the extent that each may consider appropriate:
 - (a) make enquiries by telephone, audio-visual link, in-person, or in writing;
 - (b) make any direction they consider appropriate in relation to the preparation and service of evidence and/or making of submissions by any party, including that any evidence and/or submissions be provided wholly in writing and be limited in length and topic;
 - (c) make directions for the attendance of any person, and/or the production of documents, to be compelled by subpoena;

- (d) make directions for the conduct of any hearing which they consider appropriate and conduct any such hearing.
- (6) The Reference is to be conducted with as little formality and technicality as the proper consideration of the matter permits, in a manner which is proportionate to the amounts claimed.
- (7) Any party is permitted to issue subpoena to produce in respect of production of documents.
- (8) If any party to the Reference is dissatisfied with any directions made by a Referee, that party may apply to the Senior Referee in writing for reconsideration of the directions in question, and the Senior Referee may set aside, vary, or confirm the directions in question.
- (9) The Senior Referee may make directions delegating the conduct of any part of the Reference to any one or more of the Referees, including the determination of the amount of damages payable to any sub-group of the Group Members on a cruise-by-cruise basis.
- (10) The rules of evidence do not apply to the Reference.
- (11) Any evidence before the Referees shall, unless the Referees otherwise direct, be taken by way of:
 - (a) any statement of agreed facts; and/or
 - (b) a written statement signed by the maker of the statement provided to the Referees by a party in accordance with any directions made by the Referees; and/or
 - (c) upon an application by either party of oral evidence by way of cross-examination and re-examination of the maker of any written statement, subject to such limitations as to length and topic as the Referees consider appropriate; and/or
 - (d) documents already discovered by the parties in the proceedings which are served in accordance with such directions as the Referees may make;
 - (e) such other means as the Referees consider appropriate.
- (12) Notwithstanding clause 11, the Referees shall in the first instance determine the Questions for Reference in respect of each Group Member on the basis of:

- (a) any written statements or other documents that have been served in accordance with any directions made by the Referees;
 - (b) any oral evidence;
 - (c) any written submissions of the parties that have been served in accordance with any directions made by the Referees.
- (13) If any party to the Reference is dissatisfied with any determination made by any Referee in respect of a Group Member in accordance with clause (12) (“the Original Decision”), that party may apply to the Senior Referee in writing for reconsideration of the Original Decision, stating the grounds for why the Original Decision should be varied or set aside.
- (14) Upon a party making an application for reconsideration of the Original Decision to the Senior Referee in accordance with clause (13) the Senior Referee shall convene a panel of two Referees (not including the Referee who made the original determination) (“the Panel”) to reconsider the Questions for Reference in respect of the Group Member the subject of the Original Decision.
- (15) The Panel convened in accordance with clause (14) shall conduct a rehearing and for that purpose may conduct any hearing they consider appropriate, and may allow:
- (a) any written or oral submissions that the Panel considers appropriate; and/or
 - (b) on application by a party, any oral evidence by way of cross-examination and re-examination of the maker of any written statement, subject to such limitations as to length and topic as the Panel considers appropriate.
- (16) The Panel upon any such rehearing may:
- (a) vary the terms of the Original Decision; or
 - (b) set aside the Original Decision; or
 - (c) confirm the Original Decision; or
 - (d) dismiss the application for reconsideration,

and if it does any of (a) to (c) above, the decision of the Panel shall take the place of the Original Decision.

- (17) The final report prepared by the Referees and delivered to the Court:
- (a) may consist of reports prepared in respect of sub-groups of Group Members on a Cruise-by-Cruise basis and reports in respect of individual Group Members where it is not just, cheap and quick to deal with that individual together with the other Group Members on his or her Cruise (“Cruise Reports”);
 - (b) must give reasons for the Referees’ opinion on the Questions for Reference in respect of each Group Member, which reasons may be contained in each and any Cruise Reports.
- (18) To the extent that the Referees prepare any such Cruise Reports, these shall consist of, in relation to the Group Member(s) the subject of that report:
- (a) a copy of any written statements and transcripts of evidence;
 - (b) any written submissions or transcripts of oral submissions of the parties; and
 - (c) in respect of the reasons given for the opinion of the Referees on the Questions for Reference, either:
 - (i) a transcript of any reasons and determination delivered ex tempore whether orally or in writing from time to time during the course of the Reference; and/or
 - (ii) other statement of the Referees in writing.
- (19) The parties are to provide the Referees with such administrative assistance as the Referees reasonably require, and the costs of providing that administrative assistance are to be costs in the proceedings.
- (20) The parties shall deliver to each of the Referees, as soon as practicable after the delivery of reasons for judgment by the New South Wales Court of Appeal in the appeal from the Second Primary Judgment an agreed brief of materials to include these orders, together with a copy of Part 20, Division 3 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) and a copy of the pleadings and any other material filed or tendered to date in these proceedings relevant to the questions the subject of the Reference.
- (21) Any amendments to the questions the subject of the Reference or these Terms of Reference, whether by agreement or otherwise, are to be the subject of an order made by the Court.

- (22) The Reference shall commence on such date as is directed by the Senior Referee, which date shall not be sooner than two months following the delivery of reasons for judgment by the New South Wales Court of Appeal in the appeal from the Second Primary Judgment, which occurred on 20 April 2023.
- (23) Notwithstanding the above date for the commencement of the Reference, the Referees may begin preparations for the carrying out of the Reference following the delivery of reasons for judgment by the New South Wales Court of Appeal in the appeal from the Second Primary Judgment including making such enquiries and directions as the Referees consider appropriate to facilitate the efficient conduct of the Reference upon its commencement.
- (24) The Senior Referee shall submit the report to the Court in accordance with r 20.23 of the UCPR by the date specified in the Court's orders by email to the Chambers of Justice Garling.
- (25) If for any reason the Referees are unable to comply with the order for delivery of their report to the Court by the date in the order, the Senior Referee is to provide to the Court an interim report setting out the reasons for such inability and an application to extend the time within which to deliver the report to the Court to a date when the Referees will be able to provide the report.
- (26) The Referees and each of the parties have liberty to seek directions with respect to any matter arising upon application made on 2 business days' notice in writing, save that if a matter requires the urgent assistance of the Court, the Referees or a party may approach the Chambers of Justice Garling by email, copied to the other party or parties.
- (27) The Senior Referee and each of the parties have liberty to apply to the Court to seek directions for the removal or substitution of any of the Referees, or the addition of further Referees:
 - (a) if any Referee is unable or unavailable to carry out the Reference; or
 - (b) in any other circumstance in which the Court considers it appropriate and in accordance with the just, quick and cheap resolution of the Reference, to remove or substitute any of the Referees, or add further Referees.